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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN JOSE CORTEZ,

Defendant and Appellant.

B287994

(Los Angeles County
Super. Ct. No. GA099160)

APPEAL from an order of the Superior Court of Los Angeles County, Terry Lee Smerling, Robin Miller Sloan, and Stanley Blumenfeld, Judges. Affirmed and remanded with directions.

Tracy L. Emblem, under appointment by the Court of Appeal, and the California Appellate Project, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stephanie C. Brennan, Jonathan M. Krauss and Wyatt E. Bloomfield, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Juan Jose Cortez appeals from the order terminating his probation after the trial court found he violated the terms of his probation. Cortez primarily challenges the trial court's decision to conduct the probation violation hearing concurrently with the preliminary hearing on new criminal charges. We affirm and remand for a hearing on Cortez's ability to pay the assessments and restitution fines imposed by the trial court.

PROCEDURAL AND FACTUAL BACKGROUND

In January 2017 Cortez pleaded no contest to one count of assault by means of force likely to produce great bodily injury. The trial court (Judge Stanley Blumenfeld) suspended imposition of sentence and placed Cortez on probation for five years. While on probation, Cortez assaulted his girlfriend, the police arrested him, and the People filed new charges against Cortez, as well as a motion to revoke his probation. In their motion requesting revocation, the People stated: "The People hereby move to present evidence at the defendant's preliminary hearing to establish the defendant violated the terms and conditions of his/her probation."

Three different deputy public defenders represented Cortez at three subsequent hearings, each before a different judicial officer. In October 2017 the court (Judge Terry Smerling) preliminarily revoked Cortez's probation and scheduled a probation violation hearing in a different courtroom, "Department J." The prosecutor repeated the People's request to have the court conduct the probation violation hearing and the preliminary hearing on the new charges together: "I would like

to give at least oral notice right now that we'll be seeking to hold the probation violation hearing concurrent with the preliminary hearing." Counsel for Cortez objected: "I'd like to enter an objection to holding . . . a probation violation hearing at the same time as a preliminary hearing." The trial court responded, "That can be litigated in Department J."

At the November 2, 2017 probation violation hearing the trial court (Judge Robin Miller Sloan) ruled: "I have [the new case] on calendar for preliminary hearing. I have [the probation violation case] on calendar for setting of a violation hearing. I will hear that at the same time as the preliminary hearing." Counsel for Cortez did not object, move to separate the probation violation hearing and the preliminary hearing, or indicate Cortez wanted or intended to testify. The victim and two law enforcement officers testified for the prosecution, after which counsel for Cortez stated there would be "[n]o affirmative defense." The trial court found Cortez had violated the terms and conditions of his probation. The court also held Cortez to answer the new criminal charges.

At the January 8, 2018 sentencing hearing counsel for Cortez asserted: "It's not often that a court will find someone in violation of his probation at the close of the preliminary hearing. I would ordinarily object to that. I wasn't at the preliminary hearing. I don't think that's the appropriate way of doing things. If there is a new case, I think it should be heard and then dealt with after. So to that extent, I object to this procedure going that way." Counsel for Cortez argued the trial court should reinstate Cortez's probation, but counsel did not indicate Cortez wanted to testify or make a statement in support of reinstatement. The trial court (Judge Stanley Blumenfeld again) considered Cortez's

criminal history and his performance on probation, revoked and terminated Cortez's probation, and sentenced him to four years in state prison. The People dismissed the new case, and Cortez filed a timely notice of appeal.

DISCUSSION

A. *The Trial Court Did Not Err in Conducting the Probation Violation Hearing with the Preliminary Hearing*

Cortez argues that, “by holding the preliminary hearing and revocation hearing simultaneously, [Cortez’s] due process right to present testimony at his probation revocation hearing was violated. Holding the hearings at the same time left [Cortez] with an unfair choice. He was unable to testify in his behalf about his actions that served as the basis for finding a probation violation at the preliminary/revocation hearing for fear of saying something that could incriminate himself and assist the prosecution in its burden of producing evidence to establish that he should be held to answer the new charges.” The People argue Cortez forfeited his objection to the concurrent probation violation and preliminary hearing because his attorney at that hearing “did not object when the hearings took place before Judge Sloan, despite being warned by the previous court to raise the issue at the appropriate time.” The People also argue the court did not violate Cortez’s constitutional rights.

““An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate

method. . . .” “No procedural principle is more familiar to this Court than that a constitutional right,” or a right of any other sort, “may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.”” (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590; accord, *People v. Lavoie* (2018) 29 Cal.App.5th 875, 888; see *People v. Trujillo* (2015) 60 Cal.4th 850, 856 [“a defendant generally must preserve claims of trial error by contemporaneous objection as a prerequisite to raising them on appeal”]; *People v. McCullough* (2013) 56 Cal.4th 589, 593 [“a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal”]; *People v. Riggs* (2008) 44 Cal.4th 248, 304 [failure to raise due process objection forfeited the constitutional argument on appeal].) In particular, a defendant’s failure to object to the procedures used in a probation violation proceeding forfeits an appellate challenge to those procedures. (See *People v. Martin* (1992) 3 Cal.App.4th 482, 486; *People v. Dale* (1973) 36 Cal.App.3d 191, 195.)

Here, although counsel for Cortez objected at the initial hearing and at the sentencing hearing, counsel for Cortez did not object when it mattered most: at the actual probation violation hearing when the trial court stated it intended, and then proceeded, to hold the probation violation and preliminary hearings concurrently. Nor did any of Cortez’s attorneys ever state at any of the hearings that Cortez wanted to testify but could not because the court was conducting the two hearings concurrently. Under these circumstances, Cortez arguably forfeited any objection to the concurrent hearing.

But even if preserved, the argument lacks merit. To the extent Cortez is arguing the trial court violated his due process right to separate probation violation and preliminary hearings, there is no such constitutional right. In *People v. Coleman* (1975) 13 Cal.3d 867 (*Coleman*) the defendant argued the trial court violated his due process rights by conducting a probation revocation hearing after the court held the defendant to answer new charges but before the trial on those charges. The defendant argued the court forced him to forego testifying in the probation revocation hearing to avoid incriminating himself at the trial on the new charges. (*Id.* at p. 871.) The Supreme Court recognized that requiring a probationer to choose between testifying in his or her defense at a probation revocation hearing and incriminating himself or herself at a subsequent trial created a tension between countervailing constitutional rights: the right to testify at the probation revocation hearing and the privilege against self-incrimination. (*Id.* at p. 878.)

The Supreme Court, however, declined to hold the trial court had violated the defendant's due process rights, stating that "it is far from clear that we are under any constitutional duty to obviate this tension" and that it was "unnecessary to adjudicate defendant's constitutional claim." (*Coleman, supra*, 13 Cal.3d at pp. 871, 878.) Instead, the Supreme Court created an exclusionary rule: "We accordingly declare as a judicial rule of evidence that henceforth upon timely objection the testimony of a probationer at a probation revocation hearing held prior to the disposition of criminal charges arising out of the alleged violation of the conditions of his probation, and any evidence derived from such testimony, is inadmissible against the probationer during subsequent proceedings on the related criminal charges, save for

purposes of impeachment or rebuttal where the probationer's revocation hearing testimony or evidence derived therefrom and his testimony on direct examination at the criminal proceeding are so clearly inconsistent as to warrant the trial court's admission of the revocation hearing testimony or its fruits in order to reveal to the trier of fact the probability that the probationer has committed perjury at either the trial or the revocation hearing." (*Id.* at p. 889; see *People v. Jasper* (1983) 33 Cal.3d 931, 934 [recognizing the decision in *Coleman* was not based on constitutional grounds]; *People v. Preyer* (1985) 164 Cal.App.3d 568, 572 [rejecting the argument that holding a probation revocation hearing before disposition of related criminal proceedings violated a defendant's constitutional rights]; *People v. Samuels* (1983) 147 Cal.App.3d 1108, 1112 [rejecting the defendant's constitutional arguments "premised on the same constitutional tensions and policies discussed at length in *Coleman*"].) As the Supreme Court stated in *People v. Jasper*, "[r]ather than adopt an absolute rule barring such hearings prior to trial on pending criminal charges, however, [in *Coleman*] we unanimously concluded that the lesser remedy of a limited exclusionary rule, precluding subsequent prosecutorial use of a probationer's testimony or its fruits, affords a defendant an adequate safeguard." (*Jasper*, at p. 933.)

Under *Coleman*, the trial court has discretion to hold a probation revocation hearing before or after other proceedings on new criminal charges. (*Coleman, supra*, 13 Cal.3d at p. 889; see *People v. Jasper, supra*, 33 Cal.3d at p. 935 ["[w]hether a revocation hearing should be held before trial rests in the reasonable discretion of the trial court"]; *People v. Bracey* (1994) 21 Cal.App.4th 1532, 1548 ["[t]he revocation hearing may precede

the criminal trial or vice versa”]; *People v. Preyer*, *supra*, 164 Cal.App.3d at p. 572 [“whether a probation revocation hearing should be held before or after trial is a matter for the reasonable discretion of the trial court”]; see also Pen. Code, § 1203.2, subd. (a) [a trial court with reason to believe a probationer has committed another offense may revoke probation “[a]t any time” and “regardless of whether [the defendant] has been prosecuted for those offenses”].) The Supreme Court added: “Nor do we seek now to set standards for the exercise of a court’s sound discretion in deciding whether to permit probation revocation proceedings to commence in advance of the disposition of related criminal proceedings” (*Coleman*, at p. 897; see *People v. Weaver* (1985) 39 Cal.3d 654, 659 [“[g]iven the Legislature’s broad grant of authority to the trial courts to revoke probation ‘at any time’ following the commission of a new criminal offense [citation], it would be improper for us to adopt a ‘supervisory’ rule which mandates staying such revocation proceedings as a matter of course until trial of the pending criminal charges has occurred”].) And the trial court’s discretion includes holding the probation violation and preliminary hearings concurrently. (See *People v. Arreola* (1994) 7 Cal.4th 1144, 1159 [“[a]s a means of avoiding needless duplication and promoting judicial economy, in some instances the preliminary hearing on the charges that give rise to the probation revocation proceeding may be coordinated with the final revocation hearing, in a single proceeding”]; *People v. Quarterman* (2012) 202 Cal.App.4th 1280, 1296, fn. 14 [same].)

Cortez does not argue the trial court abused its discretion with respect to the timing of the probation violation and preliminary hearings. He argues only that the court violated his constitutional right by holding the two hearings simultaneously,

a constitutional right he does not have. Therefore, his due process argument, if preserved, fails.

To the extent Cortez is arguing the trial court violated his constitutional right to testify at the probation violation hearing, or prevented him from exercising that right, his argument also fails. Although a defendant charged with a probation violation has a constitutional right to testify at a probation violation hearing to defend against the alleged violation and to present any mitigating circumstances (*Morrissey v. Brewer* (1972) 408 U.S. 471, 488-489; *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 782; *People v. Coleman, supra*, 13 Cal.3d at p. 873), there is no indication in the record that Cortez wanted to testify at the probation violation hearing or that anyone prevented him from testifying. At the initial hearing, counsel for Cortez objected to the court holding the probation violation hearing and the preliminary hearing at the same time, but counsel did not say Cortez was going to testify at the probation violation hearing. At no time during the concurrent hearing did Cortez or his counsel suggest Cortez wanted, or would have wanted, to testify. And although at the subsequent sentencing hearing counsel for Cortez expressed her belief that conducting the hearings simultaneously was not “appropriate,” she did not state Cortez would have testified but for the fact the court had combined the probation violation and hearings. Nothing in the record suggests that, but for a concern that his testimony would have aided the prosecution or be used against him, Cortez would have testified.

And there was no danger Cortez would have incriminated himself in a subsequent trial had he testified at the probation violation hearing because the exclusionary rule of *Coleman* “provides protection ‘coextensive with the scope of the privilege

against self-incrimination” (*Coleman, supra*, 13 Cal.3d at p. 892) and ensures that a defendant testifying at a probation violation hearing will not incriminate himself or herself on the current charges. The exclusionary rule of *Coleman* does not require the court to try the new charges before holding a probation violation hearing, but it does provide that, *if* the court holds the probation violation hearing first, the defendant’s testimony at the probation violation hearing will not be admissible in a subsequent trial on those charges. (See *People v. Bracey, supra*, 21 Cal.App.4th at p. 1548.)

Cortez suggests that, although the *Coleman* rule may apply to the admissibility of statements at a trial that occurs after the probation violation hearing, it does not apply to the admissibility of statements at a preliminary hearing that occurs at the same time as the probation violation hearing. The *Coleman* exclusionary rule, however, applies to all proceedings prior to the “disposition of criminal charges” (*Coleman, supra*, 13 Cal.3d at p. 889), which includes the preliminary hearing. Had Cortez objected and raised the issue at the combined hearing, the court could have addressed Cortez’s concern by deciding at the conclusion of the People’s evidence whether the People had met their low burden at the preliminary hearing to show there was probable cause to believe Cortez committed the new offense (see *People v. Leon* (2015) 61 Cal.4th 569, 596-597; *People v. Esmaili* (2013) 213 Cal.App.4th 1449, 1460; *People v. Chapple* (2006) 138 Cal.App.4th 540, 546) before deciding whether the People had shown by a preponderance of the evidence Cortez had violated the terms of his probation. The court also could have considered any testimony Cortez might have provided at the combined hearing only for the issue whether Cortez violated his probation

and not whether there was probable cause he committed the new charge. These (and other) procedural tools would have been well within the court's "broad discretion in a probation revocation proceeding." (*Coleman*, at p. 874.)

B. *The Trial Court Did Not Abuse Its Discretion in Revoking and Terminating Cortez's Probation*

Cortez argues the trial court abused its discretion in revoking his probation at the probation violation hearing without considering his progress on probation. The record does not support Cortez's argument. At the conclusion of the probation violation hearing, the trial court found Cortez had violated the conditions of his probation. The trial court did not, however, revoke Cortez's probation at that time. (See *In re T.P.* (2009) 178 Cal.App.4th 1, 4 ["a finding that [the minor] violated probation is not the equivalent of a revocation of probation"].) Although the court's minute order for the probation violation hearing states "Probation Revoked," the court did not in fact state it was revoking Cortez's probation, and the oral record of the proceedings take precedence over the minute order. (See *People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2 ["[t]he record of the oral pronouncement of the court controls over the clerk's minute order"]; *People v. Costella* (2017) 11 Cal.App.5th 1, 10 ["[w]here there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls"].)

It was not until the next hearing before a different judge that the court considered whether to reinstate or revoke Cortez's probation. (See *Coleman*, *supra*, 13 Cal.3d at p. 895, fn. 22 [after finding a probation violation, "the court must go on to decide

whether under all the circumstances this violation of probation warrants revocation”]; *People v. Bolian* (2014) 231 Cal.App.4th 1415, 1420 [“upon finding a violation of probation and revoking probation, the court . . . may reinstate probation on the same terms, reinstate probation with modified terms, or terminate probation and sentence the defendant to state prison”]; *People v. Stuckey* (2009) 175 Cal.App.4th 898, 916 [trial court has broad discretion to reinstate probation when the interests of justice so require].) At that hearing, the court considered, among other relevant circumstances, Cortez’s progress while he was on probation and concluded that revocation, rather than reinstatement, was warranted.¹

C. *Remand Is Necessary To Afford Cortez the Opportunity To Request a Hearing on His Ability To Pay Assessments and Fines*

In *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) this court held that a trial court cannot impose a court operations assessment under Penal Code section 1465.8 or a court facilities assessment under Government Code section 70373 without first

¹ Cortez asserts for the first time in his reply brief that Judge Blumenfeld believed he did not have the authority to consider Cortez’s progress during probation and other relevant matters before revoking probation. By not raising this issue until his reply brief without explanation, however, Cortez forfeited the argument. (See *People v. Zamudio* (2008) 43 Cal.4th 327, 353; *People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26; *People v. Jacobs* (2013) 220 Cal.App.4th 67, 83.) In any event, Judge Blumenfeld considered at length Cortez’s history and his performance while he was on probation. Judge Blumenfeld did not misunderstand the scope of his authority.

determining the defendant's ability to pay and that the court must stay execution of a restitution fine until the court determines the defendant has the ability to pay. (*Dueñas*, at pp. 1168, 1172.) Cortez argues in a supplemental brief that under *Dueñas* we should reverse the \$30 court facilities and \$40 court operations assessments the trial court imposed and stay execution of the two \$300 restitution fines the court imposed under Penal Code sections 1202.4 and 1202.44. The People argue that Cortez forfeited this issue by failing to raise it in the trial court and that the record does not establish Cortez is unable to pay the assessments and fines.

Cortez did not forfeit the argument. As we explained in *People v. Castellano* (Mar. 26, 2019, B286317) ___ Cal.App.5th ___ [2019 WL 1349472] (*Castellano*), at the time the trial court sentenced Cortez, “*Dueñas* had not yet been decided; and no California court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant's ability to pay. Moreover, none of the statutes authorizing the imposition of the fines, fees or assessments at issue authorized the court's consideration of a defendant's ability to pay. Indeed . . . in the case of the restitution fine, Penal Code section 1202.4, subdivision (c), expressly precluded consideration of the defendant's inability to pay. When, as here, the defendant's challenge on direct appeal is based on a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial, reviewing courts have declined to find forfeiture.” (*Castellano*, at p. ___ [2019 WL 1349472, at p. 1].)

Because Cortez's conviction and sentence are not final, a limited remand under *Dueñas* is appropriate to allow Cortez to

contest the court's imposition of the assessments and fines and to present evidence at a hearing of his inability to pay them. Cortez, however, need not present evidence of potential adverse consequences beyond the amount of the assessments or fines, and the trial court should consider all relevant factors in determining Cortez's ability to pay, including any potential Cortez may have to earn prison pay during his incarceration. (See *Castellano*, *supra*, ___ Cal.App.5th at p. ___ [2019 WL 1349472, at p. 6].) If the trial court determines Cortez does not have the ability to pay, the court must strike the assessments and stay execution of the restitution fines until the People show that Cortez does have the ability to pay. (*Ibid.*)

DISPOSITION

The order terminating probation is affirmed. The matter is remanded to give Cortez the opportunity to request a hearing on his ability to pay the assessments and fines imposed by the trial court. If Cortez demonstrates he does not have the ability to pay, the trial court must strike the court facilities and court operations assessments and stay the execution of the restitution fines. If Cortez fails to demonstrate his inability to pay, the court may enforce the assessments and fines the court previously imposed.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.